

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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ARBUTUS BIOPHARMA	:	CIVIL ACTION NO.
CORPORATION, ET AL.	:	22-252
	:	
v.	:	TELEPHONE
	:	CONFERENCE
MODERNA, ET AL.	:	
	:	

James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
May 19, 2025
Commencing at 3:05 p.m.

BEFORE THE HONORABLE MITCHELL S. GOLDBERG

APPEARANCES:

FOR THE	WILLIAMS & CONNOLLY, LLP
PLAINTIFFS:	BY: DAVID I. BERL, ESQUIRE
	680 Maine Avenue SW
	Washington, DC 20024
	(202) 434-5491
	dberl@wc.com

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Cherilyn M. McCollum, CCR-NJ, RPR
Official Court Reporter
Cherilyn_McCollum@paed.uscourts.gov

Proceedings taken stenographically and prepared utilizing
computer-aided transcription

1 APPEARANCES CONTINUED:

2

3 FOR THE KIRKLAND ELLIS, LLP
4 DEFENDANTS: BY: MARK C. McLENNAN, ESQUIRE
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
mark.mclennan@kirkland.com

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1 (Proceeding commences at 3:05 p.m.)

2 THE COURT: So what I want to make clear, which maybe
3 I didn't last time and I sort of wasn't as clear as I could be
4 last patent jury trial I handled, where I required narrowing of
5 claims in patents. I don't view, unless I got this concept
6 wrong, but I don't view narrowing, so we'll use the patents
7 here, to three, which is what my order was, to constitute a
8 proclamation the other three that aren't picked by the
9 plaintiff somehow amounts to a forfeiture of the plaintiffs'
10 right to pursue infringement on the three that they don't pick.
11 And I'm happy to hear, Mr. Berl, if I got this concept wrong,
12 but I sort of view it as, well, we've got a lot of claims on a
13 lot of patents, patent is inherently complicated for a fact
14 finder, I have other cases on my docket, I'm a visiting judge
15 in this case, and there has got to be an efficient way to
16 present this information that's incredibly, incredibly
17 complicated, so given those factors, I'm allowed to exercise my
18 discretion and narrow those claims on patents. But that
19 doesn't mean that you've lost your right to, after the dust
20 settles on the first trial, which is sort of a bellwether trial
21 in a way, you don't lose your right to still say the ones that
22 weren't picked aren't still infringed. There has been no
23 ruling on that.

24 Mr. Berl, in that general concept, are we on the same
25 page? I didn't spell it out as much the last time we were

1 together because I didn't think it was necessary. But are we
2 on the same page?

3 MR. BERL: I guess I'm not entirely sure whether we
4 are or not, Your Honor, because it has never been entirely
5 clear to me based on the case law of what the status is of
6 non-selected claims for patents. I think the general idea in
7 most of these cases, as I read them at least, is that the
8 patents or claims that are selected generally address all the
9 legal and factual issues so they will resolve all of the issues
10 with respect to the non-narrowed patents so that they, in a
11 sense, all rise and fall together, and therefore, if the
12 plaintiff wins on the selected patents, the narrow patents --

13 THE COURT: Suppose the claims, just for sake of
14 discussion -- I mean, I sort of disagree with that concept, and
15 I'm not saying I know what the case law answer is, but suppose
16 you have -- I'm just picking a number just to make a point --
17 like 15 claims in a complicated case. You can't expect a jury
18 to make a determination on 15 separate infringement claims.
19 And if they don't all mesh together, in my view, if I said,
20 well, I've got a month and I think based on an intelligent
21 attestment that only seven of these claims can be litigated on
22 infringement alone, where does that proclamation say that you
23 lose your right to the other seven? Whether we're on the same
24 page or not, I'm saying to you, I don't view it that way. I'm
25 the judge in this case, and I don't view it as a waiver at all

1 of your rights.

2 MR. BERL: Understood. Understood, Your Honor.

3 And I think the issue from our perspective is that
4 everyone agrees about how many claims the jury, fact finder can
5 digest. We proposed six, Moderna proposed six for trial, and
6 Your Honor adopted six. So in our view, the information that's
7 going to be presented to the jury will be about those six
8 claims. And whether there are three patents at trial or four
9 patents at trial or two patents at trial, that information will
10 be the same for the jury. They'll assess our three arguments
11 on infringement, which we laid out briefly on Friday. There
12 was doctrine of equivalents theory and then there are two
13 literal infringement theories, and that will be the same. So
14 the difference in terms of patent to patent is not about what
15 information the jury is going to have to hear about and digest
16 but, rather, the legal import of the jury's rulings just
17 because the patents differ from each other in terms of the
18 estoppel issues, both IPR estoppel and garden variety --

19 THE COURT: Let me ask you to educate me on a basic
20 patent concept I think I'm missing. So if you are saying six
21 claims we agree -- that's me putting aside the invalidity
22 issues that Moderna was going to raise -- but six claims go to
23 the jury, Judge, and it's not going to matter which patent they
24 come from, I mean, I don't understand why if you have one --
25 say, Here is our claim, members of the jury, here is what it

1 says, and here is why Moderna infringes, and you are doing it
2 for six separate claims, why did you need six separate patents?
3 I mean, did they come -- and one is -- five you told me are
4 under one family with the same expiration date.

5 MR. BERL: That's right. There are five under one
6 family, so let's talk about those. For the most part, the
7 claims are similar, but they differ in really important ways.
8 To take one example, one of those patents issued after the
9 beginning of Moderna's sales. So, for example, if we assert
10 that patent rather than the others, which happens to be our
11 broadest patent where we claim the most infringement under most
12 of our theories, that is our broadest patent, a third of the
13 sales we can't even touch because they happened before the
14 issuance of the patent and so --

15 THE COURT: I'm sorry to interrupt. Five in the one
16 family, which I'm looking at the number now, everything except
17 the '069?

18 MR. BERL: Everything except the '651.

19 THE COURT: I'm sorry. Okay. So the '378, the '435,
20 the '668, the '359, and the '069 are all one family.

21 MR. BERL: Yes.

22 THE COURT: Don't all of them have the same expiration
23 date?

24 MR. BERL: They have the same expiration date, but
25 they don't have the same issuance date. And we're not allowed

1 to get damages before the issuance of the patent. And so a lot
2 of Moderna's sales, for example, in late 2020, we can't recover
3 under that patent because it hadn't issued yet, and yet that is
4 our broadest patent. So we are, in a sense, having to choose
5 between our broadest patent where we confirmed the most
6 infringement in terms of the theories of literal infringement,
7 for example, and trying to capture the late-2020 sales, which
8 we can't do with this patent because it hadn't issued yet.

9 THE COURT: Would your view change if I would put
10 in -- well, I'm on the record. I'm not making a ruling now.
11 But would your view change if I were to say, I'm sticking with
12 three patents and the same number of claims, motion for
13 reconsideration is denied; however, it is understood that after
14 the first trial, to the extent that Arbutus wants to continue
15 to press other claims not litigated in the first trial, they
16 retain that right to do so? Would your view change in all of
17 this if I said that?

18 MR. BERL: I don't really think so, Your Honor. The
19 reason is it is not clear to me how that would work. Because
20 then -- I mean, would the jury's determination with respect to
21 our literal infringement theories and doctrine of equivalents
22 theories apply? And if so -- so for example --

23 THE COURT: No, it would -- to the extent the issues
24 on liability are the same, it would be a -- I mean, I heard you
25 say we're having trouble with this because we have a different

1 issuance date so our damages theory is different, and we would
2 take what happened in the first trial and then give you, to the
3 extent you had a different issuance date, give you a short and
4 quick damages trial.

5 MR. BERL: I mean, I suppose that's just the same
6 information -- I don't think our damages theories are different
7 with respect to the issuance date as much as it is that the
8 damages would only apply on the '378 after a certain date, so I
9 guess that would create two trials where there is no more
10 complexity in one trial. And so I just -- you know, I suppose
11 that's better than nothing, but I think we can just do all six
12 of these claims in one trial rather than splitting them into
13 two and it would be much more efficient that way.

14 There are -- just to take another example, you know, all
15 of these patent claims from the family you just read have all
16 of these ranges in them. Sometimes the ranges say, you know,
17 for one of them from three to 15, sometimes they say from four
18 to 10, and so a different number of lots will infringe each of
19 these different patents simply because of the numbers, you
20 know, in Moderna's products in our testing of them. So it's
21 the same issue presented to the jury: Do you agree with our
22 version of the testing from Dr. Schuster or do you agree with
23 Moderna's response? Do you agree with our theory or -- (audio
24 distortion) -- and so the jury is going to have to decide those
25 issues. The only difference is going to be -- (audio

1 distortion) --

2 THE COURT REPORTER: I'm sorry, counsel.

3 MR. BERL: -- what is the number in terms of damages
4 that -- (audio distortion) --

5 THE COURT: Mr. Berl.

6 MR. BERL: -- so that we can try this case and get
7 this done -- (audio distortion) --

8 THE COURT: Mr. Berl. Calling Mr. Berl.

9 MR. BERL: -- and then we can move on rather than
10 saying, well, the jury got this and not this and try to --
11 (audio distortion) --

12 THE COURT: Can you hear me?

13 MR. BERL: -- and then have the trial on whatever
14 claims, you know, or, I'm sorry, whatever patents did continue.

15 Again, we're fine just leaving it at six. You know, we
16 don't worry about the other -- (audio distortion) -- we want to
17 have one trial. And I think we can do that with six -- (audio
18 distortion) -- so that the difference from patent to patent is
19 all -- (audio distortion) --

20 THE COURT: Mr. Berl.

21 MR. BERL: -- in terms of damages and that's now --
22 (audio distortion) --

23 THE COURT: Mr. Berl.

24 MR. BERL: -- two patents close enough to make
25 decisions between do we -- (audio distortion) -- aren't

1 productive in terms of the efficiency of the case and aren't
2 fair in terms of the property rights.

3 THE COURT: Can you hear me, Mr. Berl?

4 MR. BERL: No. Sorry, I can't.

5 THE COURT: I said, "Can you hear me?" And you said,
6 "No."

7 MR. BERL: Right. Right when you said that, I heard a
8 faint voice. I think a button got pushed. I'm sorry, Your
9 Honor.

10 THE COURT: Can you hear me now?

11 MR. BERL: I can, Your Honor.

12 THE COURT: Okay. Well, I was trying to stop you
13 about five minutes ago because I couldn't hear a word you were
14 saying and something happened, and I'm now worried that you
15 haven't taken a breath in five minutes. Have you fainted? Are
16 you okay?

17 MR. BERL: I'm here, Your Honor.

18 THE COURT: Okay. I didn't -- about -- literally
19 about three minutes ago, the last time you started talking up
20 until now, I could not hear a word you were saying. It was
21 very blurred.

22 MR. BERL: I apologize.

23 THE COURT: It's a tech issue. It's not your fault.

24 Now give me the 30-second version of what you said in
25 the last three minutes. Say it again.

1 MR. BERL: Sure. The 30-second version is that, in
2 our view, having this done only once with one trial is the
3 simplest and most efficient way to go forward because if we
4 have -- (audio distortion) --

5 THE COURT REPORTER: Judge, I can't hear him again.

6 MR. BERL: -- the jury can be presented in a single
7 trial with only six claims. Whether there are two patents,
8 three patents, four patents -- (audio distortion) --

9 THE COURT: Mr. Berl, I can't hear you.

10 MR. BERL: -- totally different in terms of the number
11 of patents is how much you get based on adjudication of the
12 dispute. And so that's not going to add complexity to the
13 trial. It would avoid a second trial -- (audio distortion) --
14 and that's what our strong preference -- (audio distortion) --
15 and be done with it and not deal with a second trial.

16 THE COURT: That was way more than 30 seconds, and I
17 couldn't hear you again. You want to just hang up and dial
18 back in or go on a different phone? Are you on your cell
19 phone? What is going on?

20 MR. BERL: I am, Your Honor. Let me try to fix the
21 problem.

22 THE COURT: Are you in your office? Can you go to a
23 hardline?

24 MR. BERL: I don't have a hardline here,
25 unfortunately.

1 THE COURT: Just so you know, everything you said in
2 the last five minutes the court reporter I am sure -- could the
3 court reporter hear Mr. Berl? Because I couldn't.

4 THE COURT REPORTER: I couldn't hear, and I did try to
5 stop him, but he couldn't hear me. I don't think anyone could
6 hear me.

7 THE COURT: I think his technical glitch is he can't
8 hear through his phone.

9 I'm going to try to repeat what I think you said, which
10 is we're trying to be efficient, we are -- we're good with the
11 number of claims that you have narrowed it to, and if you make
12 us pick three, we may have to do a second trial, and that's not
13 efficient, we want a little more leeway to add more patents in
14 than three, and that will be more efficient.

15 I mean, is that the gist of it?

16 MR. BERL: That is the gist. The one addendum is that
17 the issues presented to the jury in terms of our infringement
18 theories would be the same. Whether it is two patents or three
19 patents or four patents, it's the same issues on infringement,
20 so what happens then is the only difference is, when the jury
21 decides those infringement issues, how much do we get in
22 damages, so that's --

23 THE COURT: I understand. I understand your argument.
24 All right. I get it.

25 So let me hear from Mr. McLennan.

1 MR. McLENNAN: Thank you, Your Honor.

2 So on this point about preclusion and what the impact
3 would be on later cases and whether plaintiffs could just
4 proceed in this in the new case, plaintiffs cited the case *In*
5 *Re: Katz*, the Federal Circuit decision, which is informative to
6 Your Honor's question. So in that case, when the court issued
7 a narrowing order requiring a limit on the number of asserted
8 claims, which also limited the asserted patents, the Federal
9 Circuit approved of the procedure and agreed with the district
10 court's decision that they would not allow the patentee to set
11 up the -- basically, the unasserted claims and save those for
12 another case. So I think it's very similar to this situation
13 here where you are suggesting that possibly these patents could
14 be asserted again. The Federal Circuit has already approved of
15 a procedure where, yes, a district court does maintain the
16 discretion to limit claims. And I don't have the cases at hand
17 addressing the preclusion effects, but I believe are not too
18 far off of what Mr. Berl was saying, that there would be some
19 preclusion effect. But generally courts assume that plaintiff
20 move forward with their strongest claims. You move forward
21 with the claims you think are strongest on infringement and
22 invalidity, and that's essentially the reason for the precluded
23 effect in later cases.

24 On the number of patents --

25 THE COURT: Hold on. So are you saying you disagree

1 with my instinct that, if I held him to three and we had a
2 trial, he would be able to maintain and ask for a trial on the
3 other three? Are you disagreeing with that premise? It sounds
4 like you are.

5 MR. McLENNAN: Your Honor, I don't think there is an
6 absolute answer I can give you on the phone now.

7 THE COURT: Okay.

8 MR. McLENNAN: I think it's an issue that is quite
9 complicated in the case law.

10 THE COURT: Okay. All right. Go ahead.

11 MR. McLENNAN: On the number of patents, counsel for
12 plaintiffs referred to there being different issuance and
13 expiry dates. So to the later-issued patents that they
14 mentioned that was broader that issued during the pandemic,
15 they could always, under the Court's order allowing them to
16 move forward with three and then two patents, they could still
17 present a case at trial and pick any one of the five other
18 patents that were issued before the alleged infringement period
19 began. They are not missing out on anything in terms of the
20 damages window. There is no reason to proceed on all six
21 patents through trial when there is only a difference in
22 issuance date for one patent. That doesn't justify keeping
23 more than two or three in the case.

24 And with the numbers that were presented in plaintiffs'
25 brief asking for five and then four patents at trial, there is

1 no analysis whatsoever justifying why that particular number is
2 any less prejudicial than the number that the Court's already
3 ordered. There just wasn't a patent-by-patent analysis
4 explaining how that could be justified. And I think other
5 counsel for plaintiffs just say that the issues of infringement
6 are the same between those patents. So if it is just about
7 damages, they can still have their full damages window under
8 the Court's current procedure.

9 THE COURT: Okay. You can respond. Go ahead.

10 MR. BERL: Yes. Let me respond to two points.

11 On the first one with respect to preclusion, what
12 Mr. McLennan is saying is that the limiting of patents would be
13 a draconian result because what they are --

14 THE COURT: No, he didn't say that. He said he wasn't
15 sure. But go ahead.

16 MR. BERL: Okay. Or that it could be a draconian
17 result. But with respect --

18 THE COURT: He didn't say that either, but go ahead.

19 MR. BERL: But with respect to the number of patents,
20 let me be clear, I mean, what Mr. McLennan just said is that we
21 could get around this by not asserting the '378 patent, which
22 is the later-issuance patent, and therefore claim the full
23 period of damages, but the issue is that the '378 patent is the
24 broadest patent. And so under some of our infringement
25 theories we would -- there is a lot more infringement of the

1 '378 than others. So what we are basically being asked to do
2 is choosing between our broadest patent that issued later, and
3 so we can't get damages for the first part of the pandemic, on
4 the one hand, or asserting a narrower patent which is less
5 infringed under some of our theories but covers the whole
6 period. We shouldn't have to make choices like that with our
7 property rights. That doesn't seem right.

8 And I'm happy to give further analysis. For example, on
9 the issue of preclusion and estoppel, there are three different
10 buckets into which these patents might fall. The '069 everyone
11 agrees they are precluded, obviously. The '435 we think their
12 statutory forum is precluded; they don't. The other three
13 patents we think they are precluded from argument based on
14 common law estoppel; they don't.

15 And so again, we're having to choose from different
16 categories for no reason. In both cases there are six claims
17 that the jury is getting. It's not going to make a difference
18 to the jury whether those six claims come from two, three, or
19 four patents. It's the same infringement theories but just
20 that the results are different.

21 THE COURT: You made that argument already. I heard
22 you.

23 Mr. McLennan, do you agree that if I allow more patents
24 it won't elongate the trial?

25 MR. McLENNAN: Your Honor, so to take us back to where

1 we started with this we when had the hearing a couple weeks
2 ago, we were asked to propose narrowing before summary judgment
3 and trial. That's exactly what we've done. So in terms of the
4 trial, maybe, you know, the focus on whether it's going to make
5 a difference at trial is one thing, but I think we also need to
6 think about the burden on the parties and the Court going
7 through summary judgment and *Daubert*. And what I essentially
8 hear is they want to keep all six patents through summary
9 judgment and *Daubert*. We laid out in our letter today --

10 THE COURT: Mr. McLennan, could you answer my
11 question?

12 MR. McLENNAN: Apologize, Your Honor. You are asking
13 us to give a different analysis for the Court -- or the jury --

14 THE COURT: No, I'm asking, in your view, if I allow
15 more than three patents in -- Mr. Berl is saying it's not going
16 to affect the length of the trial, the length of the trial is
17 going to be affected by the claims, not the number of patents.
18 Do you agree or disagree?

19 MR. McLENNAN: I disagree. We do have different
20 defenses across different patents, so I do think it increases
21 the complexity across the trial.

22 MR. BERL: Your Honor, they listed which defenses --
23 which claims their defenses are applicable to. Most of their
24 defenses they said are applicable to all of the claims.

25 THE COURT: Most of them. But my takeaway, you know,

1 with this discussion, and I could have gotten the wrong
2 impression, but I suggested -- my memory -- let's lay out on
3 *Daubert* -- to try to economize the thing, let's lay out
4 everyone's opinion so we can figure out what to do with
5 *Daubert*, and then I take, you know, whatever motions for
6 summary judgment. I thought both sides were like no, no, no,
7 no, narrow, narrow first, and then we can talk about that. But
8 so now I've done that, and I guess *Arbutus* is having a
9 different view.

10 All right. This discussion has been helpful.

11 Did you want to say anything else, Mr. Berl?

12 MR. BERL: No, Your Honor.

13 THE COURT: Okay. All right. Let me mull this over a
14 little bit and I'll -- when is this -- when is this narrowing
15 due?

16 MR. BERL: It would be due today, Your Honor.

17 THE COURT: You are not obligated to submit any -- I
18 want to think about this, so I'm giving a verbal order -- I'll
19 put it in writing, but you can tell your team you don't have to
20 submit anything today. I'm going to try to issue an order -- I
21 got a lot going on today and tomorrow, but you will hear from
22 me on this by the end of close of business tomorrow, and I'll
23 give you some time to figure out what to do. So don't worry
24 about the deadlines for today. That's off the table.

25 MR. McLENNAN: Thank you, Your Honor.

1 MR. BERL: I appreciate that, Your Honor.

2 THE COURT: Thank you. Take care.

3 (Proceeding concluded at 3:29 p.m.)

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5

6 I certify that the foregoing is a correct transcript
7 from the record of proceedings in the above-entitled matter.

8

9 /s/ Cherilyn M. McCollum

10 Cherilyn M. McCollum, CCR, RPR
11 Official Court Reporter

12 Date: 23rd day of May, 2025

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'069 [3] - 6:17, 6:20, 16:10	12:13	audio [14] - 8:23, 8:25, 9:4, 9:7, 9:11, 9:16, 9:17, 9:19, 9:22, 9:25, 11:4, 11:8, 11:13, 11:14	10:1, 13:4, 13:6, 13:12, 14:9, 14:17, 14:23	1:5	
'359 [1] - 6:20	12:16	Avenue [2] - 1:15, 2:3	cases [6] - 3:14, 4:7, 13:3, 13:16, 13:23, 16:16	confirmed [1] - 7:5	
'378 [5] - 6:19, 8:8, 15:21, 15:23, 16:1	address [1] - 4:8	avoid [1] - 11:13	categories [1] - 16:16	CONNOLLY [1] - 1:14	
'435 [2] - 6:19, 16:11	addressing [1] - 13:17		CCR [2] - 1:19, 19:10	constitute [1] - 3:7	
'651 [1] - 6:18	adjudication [1] - 11:11	B	CCR-NJ [1] - 1:19	continue [2] - 7:14, 9:14	
'668 [1] - 6:20	adopted [1] - 5:6		cell [1] - 11:18	CONTINUED [1] - 2:1	
	affect [1] - 17:16		certain [1] - 8:8	CORPORATION [1] - 1:3	
/	affected [1] - 17:17		certify [1] - 19:6	correct [1] - 19:6	
/s [1] - 19:9	ago [3] - 10:13, 10:19, 17:2		change [3] - 7:9, 7:11, 7:16	counsel [3] - 9:2, 14:11, 15:5	
1	agree [6] - 5:21, 8:21, 8:22, 8:23, 16:23, 17:18		Cherilyn [3] - 1:19, 19:9, 19:10	couple [1] - 17:1	
10 [1] - 8:18	agreed [1] - 13:9		Cherilyn_	court [4] - 12:2, 12:3, 13:6, 13:15	
10022 [1] - 2:4	agrees [2] - 5:4, 16:11		McCormack@paed.	Court [4] - 1:19, 17:6, 17:13, 19:10	
15 [3] - 4:17, 4:18, 8:17	ahead [4] - 14:10, 15:9, 15:15, 15:18		uscourts.gov [1] - 1:20	COURT [42] - 1:1, 3:2, 4:13, 5:19, 6:15, 6:19, 6:22, 7:9, 7:23, 9:2, 9:5, 9:8, 9:12, 9:20, 9:23, 10:3, 10:5, 10:10, 10:12, 10:18, 10:23, 11:5, 11:9, 11:16, 11:22, 12:1, 12:4, 12:7, 12:23, 13:25, 14:7, 14:10, 15:9, 15:14, 15:18, 16:21, 17:10, 17:14, 17:25, 18:13, 18:17, 19:2	
19 [1] - 1:9	aided [1] - 1:25		choices [1] - 16:6	Court's [3] - 14:15, 15:2, 15:8	
19106 [1] - 1:8	AL [2] - 1:3, 1:5		choose [2] - 7:4, 16:15	court's [1] - 13:10	
	alleged [1] - 14:18		choosing [1] - 16:2	Courthouse [1] - 1:7	
2	allow [3] - 13:10, 16:23, 17:14		Circuit [3] - 13:5, 13:9, 13:14	courts [1] - 13:19	
20024 [1] - 1:15	allowed [2] - 3:17, 6:25		cited [1] - 13:4	covers [1] - 16:5	
202 [1] - 1:16	allowing [1] - 14:15		CIVIL [1] - 1:3	create [1] - 8:9	
2020 [1] - 7:2	alone [1] - 4:22		claim [3] - 5:25, 6:11, 15:22	current [1] - 15:8	
2025 [2] - 1:9, 19:11	amounts [1] - 3:9		claims [32] - 3:5, 3:12, 3:18, 4:6, 4:8, 4:13, 4:17, 4:18, 4:21, 5:4, 5:8, 5:21, 5:22, 6:2, 6:7, 7:12, 7:15, 8:12, 8:15, 9:14, 11:7, 12:11, 13:8, 13:11, 13:16, 13:20, 13:21, 16:16, 16:18, 17:17, 17:23, 17:24		
212 [1] - 2:4	analysis [4] - 15:1, 15:3, 16:8, 17:13		clear [5] - 3:2, 3:3, 4:5, 7:19, 15:20		
22-252 [1] - 1:3	answer [3] - 4:15, 14:6, 17:10		close [2] - 9:24, 18:22		
23rd [1] - 19:11	apologize [2] - 10:22, 17:12		commences [1] - 3:1		
	APPEARANCES [2] - 1:13, 2:1		Commencing [1] - 1:9		
3	applicable [2] - 17:23, 17:24		common [1] - 16:14		
30 [1] - 11:16	apply [2] - 7:22, 8:8		complexity [3] - 8:10, 11:12, 17:21		
30-second [2] - 10:24, 11:1	appreciate [1] - 19:1		complicated [4] - 3:13, 3:17, 4:17, 14:9		
3:05 [2] - 1:9, 3:1	approved [2] - 13:9, 13:14		computer [1] - 1:25		
3:29 [1] - 19:3	ARBUS [1] - 1:3		computer-aided [1] - 1:25		
	Arbutus [2] - 7:14, 18:8		concept [5] - 3:5, 3:11, 3:24, 4:14, 5:20		
4	argument [3] - 12:23, 16:13, 16:21		concluded [1] - 19:3		
434-5491 [1] - 1:16	arguments [1] - 5:10		CONFERENCE [1] - 1:5		
446-4800 [1] - 2:4	aside [1] - 5:21				
	assert [1] - 6:9				
6	asserted [3] - 13:7, 13:8, 13:14				
601 [2] - 1:8, 2:3	asserting [2] - 15:21, 16:4				
680 [1] - 1:15	assess [1] - 5:10				
	assume [1] - 13:19				
A	attestation [1] - 4:21				
able [1] - 14:2					
above-entitled [1] - 19:7					
absolute [1] - 14:6					
ACTION [1] - 1:3					
add [2] - 11:12,					

<p>deal ^[1] - 11:15</p> <p>decide ^[1] - 8:24</p> <p>decides ^[1] - 12:21</p> <p>decision ^[2] - 13:5, 13:10</p> <p>decisions ^[1] - 9:25</p> <p>DEFENDANTS ^[1] - 2:3</p> <p>defenses ^[4] - 17:20, 17:22, 17:23, 17:24</p> <p>DELAWARE ^[1] - 1:1</p> <p>denied ^[1] - 7:13</p> <p>determination ^[2] - 4:18, 7:20</p> <p>dial ^[1] - 11:17</p> <p>differ ^[2] - 5:17, 6:7</p> <p>difference ^[7] - 5:14, 8:25, 9:18, 12:20, 14:21, 16:17, 17:5</p> <p>different ^[16] - 7:25, 8:1, 8:3, 8:6, 8:18, 8:19, 11:10, 11:18, 14:12, 16:9, 16:15, 16:20, 17:13, 17:19, 17:20, 18:9</p> <p>digest ^[2] - 5:5, 5:15</p> <p>disagree ^[4] - 4:14, 13:25, 17:18, 17:19</p> <p>disagreeing ^[1] - 14:3</p> <p>discretion ^[2] - 3:18, 13:16</p> <p>discussion ^[3] - 4:14, 18:1, 18:10</p> <p>dispute ^[1] - 11:12</p> <p>distortion ^[14] - 8:24, 9:1, 9:4, 9:7, 9:11, 9:16, 9:18, 9:19, 9:22, 9:25, 11:4, 11:8, 11:13, 11:14</p> <p>DISTRICT ^[2] - 1:1, 1:1</p> <p>district ^[2] - 13:9, 13:15</p> <p>docket ^[1] - 3:14</p> <p>doctrine ^[2] - 5:12, 7:21</p> <p>done ^[5] - 9:7, 11:2, 11:15, 17:3, 18:8</p> <p>Dr ^[1] - 8:22</p> <p>draconian ^[2] - 15:13, 15:16</p> <p>due ^[2] - 18:15, 18:16</p> <p>during ^[1] - 14:14</p> <p>dust ^[1] - 3:19</p>	<p>educate ^[1] - 5:19</p> <p>effect ^[2] - 13:19, 13:23</p> <p>effects ^[1] - 13:17</p> <p>efficiency ^[1] - 10:1</p> <p>efficient ^[6] - 3:15, 8:13, 11:3, 12:10, 12:13, 12:14</p> <p>either ^[1] - 15:18</p> <p>ELLIS ^[1] - 2:2</p> <p>elongate ^[1] - 16:24</p> <p>end ^[1] - 18:22</p> <p>entirely ^[2] - 4:3, 4:4</p> <p>entitled ^[1] - 19:7</p> <p>equivalents ^[2] - 5:12, 7:21</p> <p>ESQUIRE ^[2] - 1:14, 2:3</p> <p>essentially ^[2] - 13:22, 17:7</p> <p>estoppel ^[4] - 5:18, 16:9, 16:14</p> <p>ET ^[2] - 1:3, 1:5</p> <p>exactly ^[1] - 17:3</p> <p>example ^[7] - 6:8, 6:9, 7:2, 7:7, 7:22, 8:14, 16:8</p> <p>except ^[2] - 6:16, 6:18</p> <p>exercise ^[1] - 3:17</p> <p>expect ^[1] - 4:17</p> <p>expiration ^[3] - 6:4, 6:22, 6:24</p> <p>expiry ^[1] - 14:13</p> <p>explaining ^[1] - 15:4</p> <p>extent ^[3] - 7:14, 7:23, 8:3</p>	<p>five ^[8] - 6:3, 6:5, 6:15, 10:13, 10:15, 12:2, 14:17, 14:25</p> <p>fix ^[1] - 11:20</p> <p>focus ^[1] - 17:4</p> <p>FOR ^[3] - 1:1, 1:14, 2:2</p> <p>foregoing ^[1] - 19:6</p> <p>forfeiture ^[1] - 3:9</p> <p>forum ^[1] - 16:12</p> <p>forward ^[4] - 11:3, 13:20, 14:16</p> <p>four ^[6] - 5:8, 8:17, 11:8, 12:19, 14:25, 16:19</p> <p>Friday ^[1] - 5:11</p> <p>full ^[2] - 15:7, 15:22</p>	<p>14:5, 16:25, 17:12, 17:22, 18:12, 18:16, 18:25, 19:1</p> <p>Honor's ^[1] - 13:6</p> <p>HONORABLE ^[1] - 1:11</p>	<p>judgment ^[4] - 17:2, 17:7, 17:9, 18:6</p> <p>jury ^[17] - 3:4, 4:17, 5:4, 5:7, 5:10, 5:15, 5:23, 5:25, 8:21, 8:24, 9:10, 11:6, 12:17, 12:20, 16:17, 16:18, 17:13</p> <p>jury's ^[2] - 5:16, 7:20</p> <p>justified ^[1] - 15:4</p> <p>justify ^[1] - 14:22</p> <p>justifying ^[1] - 15:1</p>
<hr/>				
I				
<hr/>				
<p>idea ^[1] - 4:6</p> <p>impact ^[1] - 13:2</p> <p>import ^[1] - 5:16</p> <p>important ^[1] - 6:7</p> <p>impression ^[1] - 18:2</p> <p>IN ^[1] - 1:1</p> <p>increases ^[1] - 17:20</p> <p>incredibly ^[2] - 3:16</p> <p>information ^[5] - 3:16, 5:6, 5:9, 5:15, 8:6</p> <p>informative ^[1] - 13:5</p> <p>infringe ^[1] - 8:18</p> <p>infringed ^[2] - 3:22, 16:5</p> <p>infringement ^[18] - 3:10, 4:18, 4:22, 5:11, 5:13, 6:11, 7:6, 7:21, 12:17, 12:19, 12:21, 13:21, 14:18, 15:5, 15:24, 15:25, 16:19</p> <p>infringes ^[1] - 6:1</p> <p>inherently ^[1] - 3:13</p> <p>instinct ^[1] - 14:1</p> <p>intelligent ^[1] - 4:20</p> <p>interrupt ^[1] - 6:15</p> <p>invalidity ^[2] - 5:21, 13:22</p> <p>IPR ^[1] - 5:18</p> <p>issuance ^[9] - 6:14, 6:25, 7:1, 8:1, 8:3, 8:7, 14:12, 14:22, 15:22</p> <p>issue ^[7] - 5:3, 8:21, 10:23, 14:8, 15:23, 16:9, 18:20</p> <p>issued ^[8] - 6:8, 7:3, 7:8, 13:6, 14:13, 14:14, 14:18, 16:2</p> <p>issues ^[10] - 4:9, 5:18, 5:22, 7:23, 8:25, 12:17, 12:19, 12:21, 15:5</p>				
<hr/>				
J				
<hr/>				
<p>James ^[1] - 1:7</p> <p>Judge ^[2] - 5:23, 11:5</p> <p>judge ^[2] - 3:14, 4:25</p>				

M

Maine [1] - 1:15
maintain [2] - 13:15, 14:2
MARK [1] - 2:3
mark.mclennan@kirkland.com [1] - 2:5
Market [1] - 1:8
matter [2] - 5:23, 19:7
McCollum [3] - 1:19, 19:9, 19:10
McLennan [14] - 2:3, 12:25, 13:1, 14:5, 14:8, 14:11, 15:12, 15:20, 16:23, 16:25, 17:10, 17:12, 17:19, 18:25
mean [9] - 3:19, 4:14, 5:24, 6:3, 7:20, 7:24, 8:5, 12:15, 15:20
members [1] - 5:25
memory [1] - 18:2
mentioned [1] - 14:14
mesh [1] - 4:19
might [1] - 16:10
minutes [5] - 10:13, 10:15, 10:19, 10:25, 12:2
missing [2] - 5:20, 14:19
MITCHELL [1] - 1:11
Moderna [3] - 5:5, 5:22, 6:1
MODERNA [1] - 1:5
Moderna's [4] - 6:9, 7:2, 8:20, 8:23
month [1] - 4:20
most [8] - 4:7, 6:6, 6:11, 7:5, 11:3, 17:23, 17:25
motion [1] - 7:12
motions [1] - 18:5
move [4] - 9:9, 13:20, 14:16
MR [40] - 4:3, 5:2, 6:5, 6:18, 6:21, 6:24, 7:18, 8:5, 9:3, 9:6, 9:9, 9:13, 9:21, 9:24, 10:4, 10:7, 10:11, 10:17, 10:22, 11:1, 11:6, 11:10, 11:20, 11:24, 12:16, 13:1, 14:5, 14:8, 14:11, 15:10, 15:16, 15:19, 16:25, 17:12, 17:19, 17:22, 18:12, 18:16,

18:25, 19:1
mull [1] - 18:13

N

narrow [4] - 3:18, 4:12, 18:7
narrowed [2] - 4:10, 12:11
narrower [1] - 16:4
narrowing [5] - 3:4, 3:6, 13:7, 17:2, 18:14
necessary [1] - 4:1
need [2] - 6:2, 17:5
never [1] - 4:4
new [1] - 13:4
New [1] - 2:4
NJ [1] - 1:19
NO [1] - 1:3
non [2] - 4:6, 4:10
non-narrowed [1] - 4:10
non-selected [1] - 4:6
nothing [1] - 8:11
number [14] - 4:16, 6:16, 7:12, 8:18, 9:3, 11:10, 12:11, 13:7, 13:24, 14:11, 15:1, 15:2, 15:19, 17:17
numbers [2] - 8:19, 14:24
NY [1] - 2:4

O

obligated [1] - 18:17
obviously [1] - 16:11
OF [1] - 1:1
office [1] - 11:22
Official [2] - 1:19, 19:10
once [1] - 11:2
one [19] - 5:24, 6:3, 6:4, 6:5, 6:8, 6:15, 6:20, 8:10, 8:12, 8:17, 9:17, 11:2, 12:16, 14:17, 14:22, 15:11, 16:4, 17:5
ones [1] - 3:21
opinion [1] - 18:4
order [5] - 3:7, 13:7, 14:15, 18:18, 18:20
ordered [1] - 15:3

P

p.m [3] - 1:9, 3:1, 19:3
PA [1] - 1:8

page [3] - 3:25, 4:2, 4:24
pandemic [2] - 14:14, 16:3
part [2] - 6:6, 16:3
particular [1] - 15:1
parties [1] - 17:6
patent [27] - 3:4, 3:13, 5:14, 5:20, 5:23, 6:10, 6:11, 6:12, 6:14, 7:1, 7:3, 7:4, 7:5, 7:8, 8:15, 9:18, 14:22, 15:3, 15:21, 15:22, 15:23, 15:24, 16:2, 16:4
patent-by-patent [1] - 15:3
patentee [1] - 13:10
patents [47] - 3:5, 3:6, 3:13, 3:18, 4:6, 4:8, 4:10, 4:12, 5:8, 5:9, 5:17, 6:2, 6:8, 7:12, 8:19, 9:14, 9:24, 11:7, 11:8, 11:11, 12:13, 12:18, 12:19, 13:8, 13:13, 13:24, 14:11, 14:13, 14:16, 14:18, 14:21, 14:25, 15:6, 15:12, 15:19, 16:10, 16:13, 16:19, 16:23, 17:8, 17:15, 17:17, 17:20
period [3] - 14:18, 15:23, 16:6
perspective [1] - 5:3
Philadelphia [1] - 1:8
phone [4] - 11:18, 11:19, 12:8, 14:6
pick [3] - 3:10, 12:12, 14:17
picked [2] - 3:8, 3:22
picking [1] - 4:16
plaintiff [3] - 3:9, 4:12, 13:19
PLAINTIFFS [1] - 1:14
plaintiffs [4] - 13:3, 13:4, 14:12, 15:5
plaintiffs' [2] - 3:9, 14:24
point [2] - 4:16, 13:2
points [1] - 15:10
possibly [1] - 13:13
precluded [4] - 13:22, 16:11, 16:12, 16:13
preclusion [5] - 13:2, 13:17, 13:19, 15:11, 16:9
preference [1] -

11:14
prejudicial [1] - 15:2
premise [1] - 14:3
prepared [1] - 1:24
present [2] - 3:16, 14:17
presented [5] - 5:7, 8:21, 11:6, 12:17, 14:24
press [1] - 7:15
problem [1] - 11:21
procedure [3] - 13:9, 13:15, 15:8
proceed [2] - 13:4, 14:20
Proceeding [2] - 3:1, 19:3
proceedings [1] - 19:7
Proceedings [1] - 1:24
proclamation [2] - 3:8, 4:22
productive [1] - 10:1
products [1] - 8:20
property [2] - 10:2, 16:7
propose [1] - 17:2
proposed [2] - 5:5
pursue [1] - 3:10
pushed [1] - 10:8
put [2] - 7:9, 18:19
putting [1] - 5:21

Q

quick [1] - 8:4
quite [1] - 14:8

R

raise [1] - 5:22
ranges [2] - 8:16
rather [4] - 5:16, 6:10, 8:12, 9:9
Re [1] - 13:5
read [2] - 4:7, 8:15
really [2] - 6:7, 7:18
reason [4] - 7:19, 13:22, 14:20, 16:16
reconsideration [1] - 7:13
record [2] - 7:10, 19:7
recover [1] - 7:2
referred [1] - 14:12
repeat [1] - 12:9
REPORTER [3] - 9:2, 11:5, 12:4
reporter [2] - 12:2,

12:3
Reporter [2] - 1:19, 19:10
required [1] - 3:4
requiring [1] - 13:7
resolve [1] - 4:9
respect [6] - 4:10, 7:20, 8:7, 15:11, 15:17, 15:19
respond [2] - 15:9, 15:10
response [1] - 8:23
result [2] - 15:13, 15:17
results [1] - 16:20
retain [1] - 7:16
rights [3] - 5:1, 10:2, 16:7
rise [1] - 4:11
RPR [2] - 1:19, 19:10
ruling [2] - 3:23, 7:10
rulings [1] - 5:16

S

sake [1] - 4:13
sales [4] - 6:9, 6:13, 7:2, 7:7
save [1] - 13:11
Schuster [1] - 8:22
second [3] - 11:13, 11:15, 12:12
seconds [1] - 11:16
seem [1] - 16:7
selected [3] - 4:6, 4:8, 4:12
sense [2] - 4:11, 7:4
separate [3] - 4:18, 6:2
set [1] - 13:10
settles [1] - 3:20
seven [2] - 4:21, 4:23
short [1] - 8:3
sides [1] - 18:6
similar [2] - 6:7, 13:12
simplest [1] - 11:3
simply [1] - 8:19
single [1] - 11:6
situation [1] - 13:12
six [16] - 5:5, 5:6, 5:7, 5:20, 5:22, 6:2, 8:11, 9:15, 9:17, 11:7, 14:20, 16:16, 16:18, 17:8
sometimes [2] - 8:16, 8:17
sorry [6] - 6:15, 6:19, 9:2, 9:14, 10:4, 10:8
sort [4] - 3:3, 3:12,

3:20, 4:14
sounds ^[1] - 14:3
spell ^[1] - 3:25
splitting ^[1] - 8:12
started ^[2] - 10:19,
 17:1
STATES ^[1] - 1:1
status ^[1] - 4:5
statutory ^[1] - 16:12
stenographically ^[1]
 - 1:24
sticking ^[1] - 7:11
still ^[4] - 3:21, 3:22,
 14:16, 15:7
stop ^[2] - 10:12, 12:5
Street ^[1] - 1:8
strong ^[1] - 11:14
strongest ^[2] -
 13:20, 13:21
submit ^[2] - 18:17,
 18:20
suggested ^[1] - 18:2
suggesting ^[1] -
 13:13
summary ^[4] - 17:2,
 17:7, 17:8, 18:6
suppose ^[4] - 4:13,
 4:15, 8:5, 8:10
SW ^[1] - 1:15

T

table ^[1] - 18:24
takeaway ^[1] - 17:25
team ^[1] - 18:19
tech ^[1] - 10:23
technical ^[1] - 12:7
TELEPHONE ^[1] -
 1:4
terms ^[11] - 5:14,
 5:17, 7:6, 9:3, 9:21,
 10:1, 10:2, 11:10,
 12:17, 14:19, 17:3
testing ^[2] - 8:20,
 8:22
THE ^[46] - 1:1, 1:1,
 1:11, 1:14, 2:2, 3:2,
 4:13, 5:19, 6:15, 6:19,
 6:22, 7:9, 7:23, 9:2,
 9:5, 9:8, 9:12, 9:20,
 9:23, 10:3, 10:5,
 10:10, 10:12, 10:18,
 10:23, 11:5, 11:9,
 11:16, 11:22, 12:1,
 12:4, 12:7, 12:23,
 13:25, 14:7, 14:10,
 15:9, 15:14, 15:18,
 16:21, 17:10, 17:14,
 17:25, 18:13, 18:17,
 19:2

theories ^[10] - 5:13,
 6:12, 7:6, 7:21, 7:22,
 8:6, 12:18, 15:25,
 16:5, 16:19
theory ^[3] - 5:12, 8:1,
 8:23
therefore ^[2] - 4:11,
 15:22
third ^[1] - 6:12
three ^[21] - 3:7, 3:8,
 3:10, 5:8, 5:10, 7:12,
 8:17, 10:19, 10:25,
 11:8, 12:12, 12:14,
 12:18, 14:1, 14:3,
 14:16, 14:23, 16:9,
 16:12, 16:18, 17:15
today ^[5] - 17:9,
 18:16, 18:20, 18:21,
 18:24
together ^[3] - 4:1,
 4:11, 4:19
tomorrow ^[2] -
 18:21, 18:22
totally ^[1] - 11:10
touch ^[1] - 6:13
transcript ^[1] - 19:6
transcription ^[1] -
 1:25
trial ^[33] - 3:4, 3:20,
 5:5, 5:8, 5:9, 7:14,
 7:15, 8:2, 8:4, 8:10,
 8:12, 9:13, 9:17, 11:2,
 11:7, 11:13, 11:15,
 12:12, 14:2, 14:17,
 14:21, 14:25, 16:24,
 17:3, 17:4, 17:5,
 17:16, 17:21
trials ^[1] - 8:9
trouble ^[1] - 7:25
try ^[7] - 9:6, 9:10,
 11:20, 12:4, 12:9,
 18:3, 18:20
trying ^[3] - 7:7,
 10:12, 12:10
two ^[11] - 5:9, 5:12,
 8:9, 8:13, 9:24, 11:7,
 12:18, 14:16, 14:23,
 15:10, 16:18

U

U.S ^[1] - 1:7
unasserted ^[1] -
 13:11
under ^[8] - 6:4, 6:5,
 6:11, 7:3, 14:15, 15:7,
 15:24, 16:5
understood ^[3] - 5:2,
 7:13
unfortunately ^[1] -

11:25
UNITED ^[1] - 1:1
unless ^[1] - 3:5
up ^[3] - 10:19, 11:17,
 13:11
utilizing ^[1] - 1:24

V

variety ^[1] - 5:18
verbal ^[1] - 18:18
version ^[3] - 8:22,
 10:24, 11:1
view ^[13] - 3:5, 3:6,
 3:12, 4:19, 4:24, 4:25,
 5:6, 7:9, 7:11, 7:16,
 11:2, 17:14, 18:9
visiting ^[1] - 3:14
voice ^[1] - 10:8

W

waiver ^[1] - 4:25
wants ^[1] - 7:14
Washington ^[1] -
 1:15
ways ^[1] - 6:7
weeks ^[1] - 17:1
whatsoever ^[1] -
 15:1
whole ^[1] - 16:5
WILLIAMS ^[1] - 1:14
window ^[2] - 14:20,
 15:7
wins ^[1] - 4:12
word ^[2] - 10:13,
 10:20
worried ^[1] - 10:14
worry ^[2] - 9:16,
 18:23
writing ^[1] - 18:19

Y

York ^[1] - 2:4